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No. 07-1201

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DARYL D. HENDRIX,

Petitioner,

v.

SAMANTHA HARRINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under a Kansas statute addressing determination of parentage, when an unmarried woman undergoes an insemination procedure under the supervision of a licensed physician, the donor of the sperm is not treated as the legal father of any child thereby conceived unless the donor and the mother agree in writing that the donor will be regarded as the legal father. *See* Kan. Stat. Ann. § 38-1114(f) ("Donor Statute"). Here, the sperm donor and the mother did not enter into a written agreement so providing. The donor contends that the parties orally agreed that he would have parental rights, but the mother contends that there was no such oral agreement. This case presents the following issues:

Whether, as the Kansas Supreme Court ruled, application of the Donor Statute to determine that a sperm donor is not the legal father of children conceived through a medical insemination procedure does not violate the donor's rights under the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment under the circumstances of this case.

LIST OF PARTIES

The Petitioner is Daryl D. Hendrix, a resident of the State of Kansas, referred to as D.H. in the proceedings below.

The Respondent is Samantha Harrington, a resident of the State of Kansas, referred to as S.H. in the proceedings below.

K.M.H. and K.C.H. are S.H.'s children and are under the age of eighteen and residents of the State of Kansas. In this litigation, K.M.H. and K.C.H. have a guardian ad litem, Kevin J. Cook, appointed by the District Court of Shawnee County, Kansas.

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The District Court of Shawnee County, Kansas, sustained S.H.'s motion to dismiss D.H.'s paternity action and found that D.H. has no legal rights or responsibilities concerning K.M.H. and K.C.H. App. 75. The District Court therefore dismissed as moot two "Child In Need of Care" petitions that S.H. had filed with respect to K.M.H. and K.C.H. *Id.* D.H. filed an appeal in the Kansas Court of Appeal. The Kansas Supreme Court transferred the appeal to itself. The Kansas Supreme Court treated S.H.'s motion to dismiss D.H.'s paternity action as a motion for summary judgment and affirmed the District Court on October 26, 2007. *Id.* at 12, 46. The opinion of the Kansas Supreme Court is reported as *In re K.M.H.*, 285 Kan. 53, 169 P.3d 1025 (Kan. 2007). On December 18, 2007, the Kansas Supreme Court denied a motion for rehearing that D.H. filed. *Id.* at 1.

JURISDICTION

The Kansas Supreme Court denied rehearing on December 18, 2007. The Petition for a Writ of Certiorari ("Petition") was filed on March 17, 2008, which was ninety days after the Kansas Supreme Court's order denying rehearing. *See* S. Ct. R. 13.1, 13.3. D.H. invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

On April 7, 2008, S.H. waived her right to respond to the Petition. On April 28, 2008, the Court

requested a response. On May 12, 2008, an order was entered extending time to file a response to the Petition to and including June 27, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kan. Stat. Ann. § 38-1114(f).

The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

Kan. Stat. Ann. § 38-1115.

(a) A child or any person on behalf of such a child, may bring an action:

(1) At any time to determine the existence of a father and child relationship presumed under K.S.A. 38-1114 and amendments thereto; or

(2) at any time until three years after the child reaches the age of majority to determine the existence of a father and child relationship which is not presumed under K.S.A. 38-1114 and amendments thereto.

STATEMENT OF THE CASE

Respondent S.H. is a single woman who wished to be inseminated under the care of a physician using sperm of a known donor. She approached D.H., who was a friend, but with whom S.H. did not otherwise have a relationship, and requested that he donate sperm. D.H. agreed to do so. D.H. and S.H. were Kansas residents at all relevant times. S.H. is a lawyer; D.H. is not.

D.H. and S.H. did not enter into any written agreement regarding the sperm donation or providing for D.H. to be treated as a legal father of any child or children born as a result of the insemination procedure. D.H. and S.H. dispute whether they contemplated or orally agreed that D.H. would play any parenting role. S.H. contends there was no such agreement; D.H. contends there was.

S.H. underwent two medical insemination procedures in Missouri. For the first procedure, D.H. accompanied S.H. to Missouri and provided semen to medical personnel at a fertility clinic. The first procedure was not successful. For the second procedure,

D.H. placed his semen in a plastic container and gave it to S.H. for her to take to the fertility clinic in Missouri. S.H. underwent the second medical insemination procedure at the Missouri fertility clinic. The second procedure was successful, and S.H. gave birth to twins, a boy and a girl, on May 18, 2005. (The Petition's reference at page i to "twin daughters" is erroneous.)

A. Trial Court Proceedings

The day after the children's birth, S.H. filed a "Child in Need of Care" (CINC) petition in the District Court of Shawnee County, Kansas, seeking a determination that D.H. would have no parental rights with respect to the twins. On May 31, 2005, D.H. filed a separate paternity action claiming parental rights, including joint custody and visitation, and acknowledging financial responsibility for the twins. The District Court consolidated D.H.'s paternity action with S.H.'s CINC petition, in which a guardian ad litem had been appointed for the children.

S.H. filed a motion to dismiss the paternity action, invoking a Kansas statute that provides:

> the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.

Kan. Stat. Ann. § 38-1114(f) ("Donor Statute"). S.H.'s motion contended that, under the Donor Statute, D.H. was not a legal parent of the twins because there was no written agreement between D.H. and S.H. providing that he would have parental rights. S.H. also contended that the intent of the parties prior to insemination was clearly that S.H. would be a single parent and that D.H. would have no role beyond that of sperm donor. S.H.'s motion explained that S.H. sought out fertility tests and treatments on her own; that D.H. did not attend the second insemination procedure or prenatal sonograms or medical appointments; and that D.H. did not provide emotional support or financial assistance during the pregnancy or following the children's birth.

In addition to raising several state-law issues, D.H. contended that the Donor Statute, if applicable, would unconstitutionally deprive him of the right to care, custody, and control of the children. D.H.'s briefing referred to the Fourteenth Amendment and due process rights. D.H.'s trial court memorandum brief did not assert constitutional claims on behalf of the children, K.M.H. and K.C.H. His brief's only reference to the rights of children in general was contained in a description of an Ohio case. *See* Mem. Br. of D.H. 7 (Dist. Ct. Shawnee Cty., Nov. 15, 2005) ("D.H.'s Mem. Br.") (describing case as holding a statute "unconstitutional because public policy supports the concept of legitimacy and the concomitant rights of a child to support and inheritance").

The District Court held that the Donor Statute applied. Rejecting a contention by D.H., the District Court found that S.H.'s filing of a CINC petition and that petition's references to D.H. as a "father" did not satisfy the written agreement requirement of the Donor Statute. The District Court found instead that "the intent of [S.H.] in her CINC filings is so clear and is in such conflict with the position claimed by [D.H.]." App. 74.

The District Court also rejected D.H.'s constitutional arguments, holding, without specifying any particular constitutional provisions, that the Donor Statute does not violate any Kansas or federal constitutional rights. *Id.* at 71-73.

The District Court concluded that, under the Donor Statute, because there was no written agreement between the parties for D.H. to be deemed a birth father, D.H. "has no legal rights or responsibilities concerning" the children. *Id.* at 75. The District Court therefore granted S.H.'s motion to dismiss D.H.'s paternity action and dismissed S.H.'s CINC petition as moot. *Id.* at 75.

B. Kansas Supreme Court Proceedings

1. Majority and Concurring Opinions

D.H. appealed to the Kansas Court of Appeals, and the Kansas Supreme Court transferred the case to itself. App. 67.

The Kansas Supreme Court affirmed. In an opinion by Justice Beier, the court ruled that Kansas law applied. The Court interpreted the Donor Statute as applying to the circumstances of this case, rejecting D.H.'s contention that the statute was inapplicable because he provided his semen to S.H. to take to a fertility clinic rather than himself providing his semen to a licensed physician. *Id.* at 40-42.

The court also rejected D.H.'s contention that S.H.'s CINC petition, including its references to D.H. as "father," constituted, or even evidenced, a written agreement that D.H. would be regarded as a legal father of the children. *Id.* at 42-43. The court noted that S.H.'s CINC petition "may have been an odd procedural vehicle," but "she and her counsel were in uncharted waters." *Id.* at 43.

The court further held under Kansas law that D.H. had waived the argument, raised for the first time in his appellate reply brief, that S.H. had "unclean hands." *Id.* at 44-45. D.H.'s contention was that "he, as a nonlawyer, was tricked by lawyer S.H." *Id.* at 44. The court held that D.H. had failed to provide an adequate appellate record and had "never proffered evidence to support his assertion of nefarious conduct by S.H." *Id.* at 45. In rejecting D.H.'s equitable arguments, the court expressly held open the possibility that a donor could make an adequate equitable showing "in the future" but stated that "[t]his is not such a case." *Id.* at 45-46.

Regarding the constitutionality of the Donor Statute, the court noted that D.H.'s brief made only "a general allegation" that the Donor Statute is unconstitutional, but the court assumed that his challenge relied on the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as related provisions of the Kansas Constitution. *Id.* at 16. The court observed that D.H. had clarified at oral argument that he challenged the statute only as applied to him, "a known sperm donor who alleges he had an oral agreement with the twins' mother that granted him parental rights." *Id.* at 16.

Emphasizing that D.H.'s constitutional challenge was an issue "of first impression, not only in Kansas but nationally," *id.* at 17, the court noted that, unlike numerous other states that completely bar sperm donors (other than husbands) from being deemed legal parents in connection with medical insemination procedures, the Kansas statute expressly provides that a donor and a recipient can choose by written agreement to provide for the donor to be a parent. *Id.* at 30.

The court treated D.H.'s equal protection claim as gender-based, *id.* at 31-34, and rejected that claim after identifying numerous "legitimate legislative purposes or important governmental objectives underlying" the Donor Statute and substantially furthered by it. *Id.* at 33-34. The court noted that the statute encourages sperm donation; protects donors from unwanted paternity or support claims; protects female recipients from potential claims of parental

rights by sperm donors, absent a written agreement; and "encourages early resolution of the elemental question of whether a donor will have parental rights . . . while there is still balanced bargaining power on both sides of the parenting equation." *Id.* at 33-34.

In addressing D.H.'s due process challenge to the statute, the court rejected his argument that he was denied "a meaningful opportunity to be heard" on his claim of an oral agreement. *Id.* at 34. The court stated that it accepted D.H.'s evidence regarding an oral agreement for the purpose of reviewing the District Court's summary disposition of the paternity action. *Id.* at 34-35. The court concluded, however, that D.H. was not denied any procedural right because "the statute merely sets up a burden of proof that his own inaction before donating his sperm left him unable to meet." *Id.* at 35. (The assertion by *Amicus Curiae* Alliance Defense Fund ("ADF") on page 1 of its brief that the state court "accepted" that D.H. and S.H. orally agreed that D.H. would have parental rights is incomplete in light of the limited purpose for which the court regarded D.H.'s evidence.)

The court characterized the remainder of the due process challenge as substantive and rejected the contention "that the requirement of a writing transforms what is an otherwise constitutional statute into one that violates D.H.'s substantive due process rights." *Id.* at 36-37. According to the court, the Donor Statute "ensures no *attachment* of parental rights to sperm donors in an absence of a written

agreement to the contrary; it does not *cut off* rights that have already arisen and attached." *Id.* at 37.

The court did not address any constitutional claims on behalf of K.M.H. and K.C.H., but briefly discussed children's interests as a matter of public policy. App. 38-40. The only reference to children's rights was the same description of the Ohio case that D.H. had included in his trial court memorandum. Br. of Appellant D.H. 8 (Kan. Ct. App., transferred to Kan. S. Ct.).

Chief Justice McFarland authored a concurring opinion emphasizing that the Donor Statute protects both parties, enabling a potential donor to "say no deal and walk away" if a potential recipient refuses to enter into a written agreement that the donor will be a legal parent. App. 46, 49.

2. Dissenting Opinions

Two Kansas Court of Appeals judges sitting by appointment dissented. App. 46, 50, 64. Judge Caplinger, joined by Judge Hill, viewed the Donor Statute as violating due process because the statute "permits a donor to waive his right to parent simply by his own inaction rather than through an intentional act relinquishing that right." *Id.* at 54-55. Judge Hill's dissent expressed concern that, as a result of the application of the Donor Statute in this case, the District Court "never got to the point of deciding the best interests of the children." *Id.* at 65.

3. Denial of Motion for Rehearing

D.H. filed a motion for rehearing and a simultaneous request to supplement the record in the Supreme Court. In the motion for rehearing, D.H. asserted fundamental constitutional rights of the children and urged that they be considered in deciding the constitutionality of the Donor Statute. D.H.'s Mot. for Reh'g 7-14 (Kan. S. Ct., Nov. 15, 2007). The Kansas Supreme Court denied the motion for rehearing on December 18, 2007.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition, which concedes that this is a "case of first impression." Pet. 4. There is no conflict of authority among state or lower federal courts regarding the questions presented, and, as explained below, the decision of the Kansas Supreme Court is consistent with this Court's precedents.

Many states facilitate the use of donor insemination by clarifying that a sperm donor is not a legal parent, except in certain circumstances, such as where the donor is married to the recipient and consents to the insemination.[1] Like several other

[1] The Kansas Supreme Court cited to twenty state statutes, including the Kansas statute. *See* App. 18 (citing to statutes of Alabama, California, Colorado, Illinois, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio,

(Continued on following page)

states' measures, *see* App. 31 (citing statutes of Arkansas, Florida, New Hampshire, New Jersey, and New Mexico), the Kansas Donor Statute includes that general rule, but also provides a clear means by which a man who provides sperm and who is not married to the recipient can be deemed a legal parent of a child born as a result: by entering into a written agreement so providing with the recipient.

The Petition broadly contends that any man "who knowingly donates his sperm to a known unmarried woman automatically has a fundamental right to parent when a child is conceived." Pet. 25. State legislatures, however, have enacted dozens of measures that recognize that being a donor of sperm is not the same as being a legal parent. The Petition's argument, if accepted by this Court, could put at risk the ability of the states to facilitate insemination by known donors, with a resulting reduction in reproductive options for both women and men. There is no need for this Court to weigh in on this issue, and certainly not here, where Kansas law clearly provides that if a man wishes, he can condition his donation of sperm on being deemed a legal parent of any resulting child.

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and Wisconsin); *id.* at 21 (Connecticut, Idaho, and Virginia); *id.* at 25-26 (Oregon); *id.* at 31 (Arkansas, Florida, New Hampshire). At least five other states have such statutes. *See* N.D. Cent. Code § 14-20-60; Tex. Fam. Code Ann. § 160.702; Utah Code Ann. § 78-45g-702; Wash. Rev. Code § 26.26.705; Wis. Stat. § 891.40(2); Wyo. Stat. Ann. § 14-2-902.

Given the competence of state legislatures and courts to protect the interests of all parties connected to medical insemination procedures under state domestic relations laws, this Court should not review novel questions of constitutional law that would benefit from further consideration in the courts of the states.

Moreover, several of the issues raised in the Petition and the briefs of supporting *amici curiae* were not timely raised below and were not decided by the Kansas Supreme Court. In particular, D.H. did not timely raise any specific constitutional claims on behalf of the children, K.M.H. and K.C.H., and the Kansas Supreme Court therefore did not decide any question regarding the children's rights under the Due Process or the Equal Protection Clauses. *See infra,* Section III. The Petition's fourth and fifth questions therefore are not properly presented. There are also serious prudential standing concerns with respect to those questions. *See infra,* Section V.

In addition, although *amicus curiae* ADF argues that application of the Donor Statute to D.H. impermissibly discriminates based on gender, Br. of *Amicus Curiae* Alliance Defense Fund ("ADF Br.") 16-22, the Petition itself does not ask this Court to consider that question, but instead argues that the Kansas Supreme Court mischaracterized D.H.'s equal protection claim in treating it as gender-based. Pet. 27. There is clearly no need for this Court to review any gender-based equal protection issue here.

As further explained below, the Kansas Supreme Court's decision is correct. Application of the Donor Statute did not violate D.H.'s rights under the Equal Protection Clause or Due Process Clause. This Court should deny the Petition.

I. This Court Should Deny The Petition Because There Is No Conflict Among State Or Federal Decisions.

As the Kansas Supreme Court recognized, App. 17, and as the Petition concedes, Pet. 4, the constitutional questions in this case are issues of "first impression" that no other courts – state or federal – have addressed. The Kansas Supreme Court's decision accordingly does not conflict with any published state court or federal court decision, and this Court should deny review.

ADF points to two appellate cases – both intermediate state appellate court decisions – that have addressed, in ADF's words, "similar" statutes under "similar circumstances." ADF Br. 6. Neither of those cases presents a conflict with the decision of the Kansas Supreme Court.

In *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989), a sperm donor claimed that he had provided his sperm "in reliance on an agreement . . . that he would have parental rights." *Id.* at 242. The Oregon donor statute at issue provided that, unless a donor is the woman's husband, the donor "shall have no right, obligation or interest with respect to a child born as a

result of the artificial insemination." *Id.* at 242 n.1. In contrast to the Kansas statute, the Oregon statute did not provide the donor with any mechanism that would allow the mother and the donor to agree that the donor would have status as a legal parent. *Id.* The Oregon court held that the statute could not constitutionally be applied so as to impose an "absolute bar" to paternity, and that the petitioner was entitled to an opportunity to prove that he and the mother had entered into a parenting agreement prior to the insemination – that is, that he "ha[d] 'grasped the opportunity' to 'participate in the rearing of his child.'" *Id.* at 245 (quoting *Lehr v. Robertson*, 463 U.S. 248, 261, 262 (1983)). The Kansas Donor Statute does not pose any such "absolute bar" to a sperm donor having parental rights, but rather provides a means by which a sperm donor can be deemed a legal parent. Accordingly, there is no conflict.

At issue in the other case to which ADF cites, and to which the Petition cites, as well, *see* Pet. 10, was the applicability of an Ohio statute providing that a donor of semen to an unmarried woman for use in a medical insemination procedure is not entitled to the status of parent. *C.O. v. W.S.*, 64 Ohio Misc. 2d 9, 639 N.E.2d 523 (Ohio Ct. of Common Pleas 1994). The Ohio intermediate appellate court addressed the constitutionality of the statute only "[a]ssuming *arguendo*" that the statute applied and concluded that application of the statute would violate due process protections. *Id.* In contrast to the Kansas Donor Statute, the Ohio statute did not provide any

means for a donor to become a parent. Given this material difference, there is no conflict between the Ohio and Kansas court decisions.

The Petition cites to three other state-court decisions, all three of which are trial court decisions, two of which are unpublished, and none of which is in conflict with the Kansas Supreme Court decision. Pet. 32. Two of those trial court decisions involved the parental rights of lesbian partners or spouses with respect to children conceived through medical insemination, but did not concern the rights of sperm donors. *See Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (N.Y. Sup. 2008); *H.M. v. E.T.*, 851 N.Y.S.2d 58 (N.Y. Fam. Ct. 2007) (unreported disposition). In the third case, a Connecticut trial court ruled in an unpublished decision that a known sperm donor had standing to maintain a paternity action where both he and the sperm recipient had signed an acknowledgment of paternity that had the effect of a judgment. *See Browne v. D'Alleva,* 2007 WL 4636692, *12-*13 (Conn. Super. Ct. Dec. 7, 2007) (unpublished opinion). Those cases plainly present no conflict with the Kansas Supreme Court's decision.

II. The Kansas Supreme Court's Decision Of Substantive Due Process Questions Was Correct And Does Not Warrant Review.

This Court has never addressed the constitutional rights of sperm donors, much less announced that a donor of sperm used in a medical insemination

procedure has a fundamental right to parent any child conceived using that sperm. Neither the Petition nor the briefs of *amici* identify any conflict with this Court's decisions. Rather, D.H. and *amici* seek the recognition of a new fundamental right.

As this Court has recognized, "[i]in the vast majority of cases, state law," not federal constitutional law, determines whether a parental relationship exists. *Lehr*, 463 U.S. at 256; *cf. Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (rejecting argument that putative biological father had fundamental right to parent child and upholding state-law presumption that the husband of a married woman is the father of children born during the marriage). Notably, in the context of medically supervised insemination, twenty-five states have enacted statutes that provide that, except in certain circumstances, a man who provides sperm for use in a medical insemination procedure is a *donor*, not a *parent*. *See supra,* n.1 (citing statutes). Because it is often the case that a woman undergoing an insemination procedure and the man providing sperm are not in a marital or other close relationship, many states have recognized the need to spell out clearly whether a donor of sperm for such procedures will be deemed a parent.

The Petition contends that a known sperm donor automatically has a fundamental right to parent if the recipient is unmarried. Pet. 25. This Court has expressly held, however, that "the mere existence of a biological link" is insufficient to give rise to a constitutionally protectible liberty interest under the

Fourteenth Amendment. *Lehr*, 463 U.S. at 261. Although this Court has recognized the fundamental right of legal parents to make decisions concerning the care, custody, and control of their children, *see Troxel v. Granville*, 530 U.S. 57, 65-66 (2000), this Court has refused to extend that right to birth fathers who have no more than a genetic link to a child, *see Lehr*, 463 U.S. at 261. And this Court has never taken the leap that D.H. asks the Court to take here: to recognize a protected liberty interest of a *donor* of sperm to *parent* a child conceived as a result of a medical insemination procedure using his sperm.

As this Court has observed, "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." *Lehr*, 463 U.S. at 259-60 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)). Thus, this Court has recognized a constitutionally protected liberty interest where an unmarried father has an established relationship with the mother and the child. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972) (recognizing a protected liberty interest where the biological father lived with the mother for eighteen years and helped raise the children he sought to parent). Where a man has no more than a "mere . . . biological link," however, this Court has declined to recognize a protected liberty interest. *Lehr*, 463 U.S. at 261; *see Quilloin v. Walcott*, 434 U.S. 246 (1978) (finding no liberty interest when the putative father failed to take any action to establish his parental

rights until after adoption proceedings had commenced).

In *Lehr*, 463 U.S. 248, the Court addressed whether New York had adequately protected an unmarried father's "inchoate relationship" with a child he had not supported and had rarely seen. *Id.* at 249-50. The statute at issue required an unmarried father under certain circumstances to record his name in the state's "putative father registry" in order to be entitled to notice of adoption proceedings regarding his child. *Id.* at 250-51. The father in *Lehr* argued that he had a constitutional right to notice and an opportunity to be heard on the ground that "a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law." *Id.* at 255. Although the Court recognized that the parent-child bond is "sufficiently vital to merit constitutional protection *in appropriate cases*," *id.* at 256 (emphasis added), the Court concluded that absent any commitment to the responsibilities of parenthood, the father's interest in personal contact with his child did not acquire "substantial protection." *Id.* at 261.

In *Lehr*, the Court noted that New York law had provided a clear step that the putative father could have taken to guarantee notice of any adoption proceedings – "mailing a postcard to the putative father registry." *Id.* at 264. *Lehr* thus supports the Kansas Supreme Court's ruling in this case. Kansas law clearly defines how a sperm donor who is not married

to the recipient can be deemed a legal father. As the Kansas Supreme Court noted, "[e]ven a sperm donor with no relationship to the child's mother can forge and protect his parental rights by insisting on a written agreement." App. 36. In this case, D.H. did not do so.

Although the Donor Statute requires that the donor obtain the recipient's consent, the donor is free to decide not to donate sperm if the recipient will not agree that the donor will be the legal father of any child conceived. (This case thus does not present the fifth question that the Petition lists for review: whether the Kansas Supreme Court's decision erroneously recognizes a woman's "discretionary powers to divest her children . . . from a relationship of companionship and support from their father." Pet. iv.)

Furthermore, there is no warrant for this Court to grant the Petition to consider D.H.'s argument that he has a fundamental interest in parenting the children because of an alleged oral agreement with S.H. regarding parental rights – a matter that S.H. vigorously disputes. D.H.'s Petition is essentially an invitation to dismantle the protections that Kansas and other states have enacted to encourage men to donate sperm—for the sake of donors who are unaware of the law.

D.H.'s asserted ignorance of the writing requirement does not affect the constitutional analysis. In *Lehr,* the putative father had not known that by

mailing a postcard to the putative father registry he would have been guaranteed notice of adoption proceedings, but, as this Court explained, "[t]he possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." *Id.* at 264.

Contrary to the suggestion in the Petition's third-listed question, this case does not present an issue regarding "an implied waiver of fundamental rights." Pet. iii. The decision of the Kansas Supreme Court is consistent with this Court's precedents requiring that waivers of constitutional rights be made knowingly. Under the Donor Statute, in the absence of a written agreement, a donor has no parental rights to waive. In D.H.'s case, the right to be a legal father simply never attached at all given that D.H. did not enter into a written agreement. *See* App. 37.

The operation of the Kansas statute in this respect is similar to many other rules adopted by the states to determine parental status. The constitutional validity of applying such rules does not hinge on whether potential parents are aware of what the law provides or requires. D.H.'s primary reliance on waiver cases in the criminal context, such as *Johnson v. Zerbst,* 304 U.S. 458 (1938), and *Miranda v. Arizona,* 384 U.S. 436 (1966), *see* Pet. 22, is misplaced. As this Court has long held and recently reaffirmed, "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Elk Grove Unified Sch. Dist. v.*

Newdow, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)). The Kansas Supreme Court's decision that its parentage statute should apply in this case regardless of whether D.H. was aware of its requirements is unexceptional and does not warrant this Court's review, particularly given that the decision left open the possibility of equitable exceptions in future cases. App. 44-46.

As explained in Section IV.B below, even were any fundamental right implicated by the application of the Donor Statute to D.H. in this case, the application of that statute would survive strict scrutiny. There is no cause, however, for the Court to review any substantive due process issue here. This is not an arena that this Court should enter. *See Troxel*, 530 U.S. at 93 (2000) (Scalia, J., dissenting) (advising against "a new regime of judicially prescribed, and federally prescribed, family law").

III. The Kansas Supreme Court's Decision Of Procedural Due Process Questions Was Correct And Does Not Warrant Review.

The Kansas Supreme Court correctly ruled, consistently with this Court's precedents, that application of the Donor Statute to D.H. did not violate his procedural due process rights. App. 34-35. That court recognized that the gist of D.H.'s due process claim was substantive, not procedural. *Id.* at 35. Indeed, for purposes of reviewing the trial court's summary disposition of D.H.'s paternity action, the Kansas

Supreme Court *accepted* D.H.'s evidence of an oral agreement. D.H.'s problem, the court rightly concluded, was not that he was denied a meaningful opportunity to be heard, but that "his own inaction before donating his sperm left him unable to meet" the showing required under the Donor Statute. *Id.* Although concluding that D.H. had failed to preserve any equitable arguments or to proffer evidence supporting his allegations of improper conduct by S.H., the court expressly held open the possibility that in future cases donors might be able to make factual showings that would justify excusing the writing requirement for equitable reasons. *Id.* at 45-46.

A plurality of this Court similarly rejected a procedural due process claim in *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (plurality opinion of Scalia, J.). The plurality examined a California statute imposing a conclusive determination that, with certain exceptions, a child born to a woman cohabiting with her husband was presumed to be a child of the husband. *Id.* at 117-18. A man who had engaged in an adulterous affair with a married woman and then sought paternity rights with respect to a child so conceived contended that he was deprived of procedural due process by application of the statute's conclusive determination. *Id.* at 115-16. The plurality rejected the procedural due process challenge, concluding that the paternity statute was "a substantive rule of law" under which, in certain circumstances, it was "*irrelevant* for paternity purposes" who the biological father of the child was. *Id.*

at 119. The same analysis applies here, where an oral agreement, even if it could be shown, simply fails to satisfy the substantive requirement of the Donor Statute that there be a written agreement.

D.H. and ADF erroneously suggest that the Kansas Supreme Court's opinion is at odds with *Stanley v. Illinois,* 405 U.S. 645 (1972), in which this Court held that an unmarried father was entitled to a fitness hearing before his children could be taken away from him after the death of their mother. Pet. 12, 19, 23; ADF Br. 14-15. Under Illinois law, an unmarried father in such circumstances was presumed unfit without any hearing. *Stanley,* 405 U.S. at 646. The result and reasoning of *Stanley* are distinguishable from this case. First, in *Stanley*, the petitioner's "private interest" for due process analysis was strong: he was initially a legal father, living with children he had "sired and raised," who were then separated from him by the state after the death of the children's mother. *Id.* at 651. This Court, of course, has never identified any liberty interest of a sperm donor in being deemed a legal father of children conceived through a medical insemination procedure. No such interest attaches as it would from raising a child.

Second, in *Stanley*, the state's asserted interest in the challenged presumption was administrative efficiency, which the Court found "insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family." *Id.* at 658. The Donor Statute, by contrast, serves numerous

important interests: encouraging able men to donate sperm to thereby expand reproductive options for married and unmarried women, protecting donors from unwanted paternity claims, and protecting recipients and the stability of their family units.

Third, parental fitness is not at issue here as it was in *Stanley*. In *Stanley*, the father was presumed unfit to continue as a parent. *Stanley,* 405 U.S. at 646-47. The Donor Statute does not address any party's fitness to be a parent, but rather sets forth circumstances under which a provider of sperm is a parent.

To the extent that D.H. cites to *Stanley* seeking support for his claim that he is entitled to an opportunity to prove an oral agreement, the Kansas Supreme Court made plain that he was not denied a hearing on that issue. App. 34-35. Indeed, the court accepted his evidence for the purpose of reviewing the trial court's summary disposition of the paternity action and indicated the possibility that it would have considered equitable arguments and evidence had he preserved such arguments and proffered such evidence. *Id.* at 34-35, 45-46. D.H.'s problem is not procedural; it is that he cannot satisfy the substantive showing required by Kansas law: a written agreement.

In light of D.H.'s lack of a liberty interest as a donor, the important nature of the state's interests, and the lack of utility of any further procedural opportunities, the Kansas Supreme Court's rejection

of D.H.'s procedural due process challenge was correct and consistent with this Court's rulings. All that D.H. seeks is correction of purported error, and there was none here.

IV. The Kansas Supreme Court's Decision Of Equal Protection Questions Was Correct And Does Not Warrant Review.

The Petition's discussion of D.H.'s equal protection challenge to the Donor Statute fails to allege any conflict among the decisions of state or lower federal courts or to allege that the decision of the Kansas Supreme Court conflicts with any of this Court's rulings. Pet. 23-28.

In the Kansas Supreme Court, D.H. limited his as-applied equal protection challenge to the situation of "a known sperm donor who alleges he had an oral agreement with the [children's] mother that granted him parental rights." App. 16. There is no need for this Court to grant the Petition given the limited scope of D.H.'s challenge and given that the parties vigorously dispute whether there was such an oral agreement. As explained below, the Kansas Supreme Court decision correctly applied this Court's precedents, and this case does not present any equal protection issue that would warrant granting the Petition.

A. D.H. Does Not Pursue Any Argument That The Kansas Donor Statute Impermissibly Discriminates Based On Gender, And No Gender-Based Discrimination Issues Warrant Review.

Although the Kansas Supreme Court decided that the Donor Statute does not impermissibly discriminate based on gender, it appears that D.H. does not pursue a gender-based equal protection argument in this Court. His second Question Presented asks "[w]hether the Kansas Supreme Court erred in applying an intermediate level of scrutiny *as if* the equal protection claim was gender-based," Pet. iii, and the Petition elsewhere states that "[t]he Kansas Supreme Court mischaracterized D.H.'s equal protection argument as gender-based," *id.* at 27. The brief of *amicus* ADF does include gender-discrimination arguments, but ADF merely seeks correction of purported errors in the Kansas Supreme Court's application of intermediate scrutiny. *See* ADF Br. 20; App. 32. There is no such error.

First, the Donor Statute does not discriminate based on gender because males as sperm donors and females as recipients are not similarly situated for purposes of equal protection analysis. *See Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) ("The Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike."). The Kansas Supreme Court wisely expressed skepticism of the contrary argument, but

assumed simply for purposes of argument that D.H. and S.H. were similarly situated. App. 33. As this Court has acknowledged, however, "[p]hysical differences between men and women . . . are enduring." *U.S. v. Virginia,* 518 U.S. 515, 533 (1996) (citation omitted).

A sperm donor and a woman who is receiving donated sperm in a medical insemination procedure are not similarly situated. The recipient is receiving donated sperm and consenting to a medical procedure that, if successful, will result in her becoming pregnant and giving birth to a child and being a mother. *Cf. Nguyen v. INS*, 533 U.S. 53, 65 (2001) ("The mother knows that the child is in being and is hers and has an initial point of contact with him.").

A donor other than a consenting husband of the recipient may or may not have any desire to participate in the life of the child in any way or to establish any relationship with the child, unlike the recipient, who will at least have the initial relationship of birth and who is consenting to that initial relationship. Indeed, the donor may not even be aware of whether the recipient conceived as a result of the donated sperm. *Cf. Nguyen,* 533 U.S. at 65 ("Given the 9-month interval between conception and birth, it is not always certain that a father will know that a child was conceived."). The donor and the recipient are not similarly situated.

Even assuming that the Donor Statute's differentiation between sperm donors and recipients can be

deemed a classification based on gender, the Kansas Supreme Court correctly determined that the statute survives intermediate scrutiny because the classification in the statute "serves important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives." *U.S. v. Virginia*, 518 U.S. at 533.

The Kansas Supreme Court identified numerous "legitimate legislative purposes or important governmental objectives underlying" the Donor Statute. App. 33. The court noted that the statute "encourages men who are able and willing to donate sperm" to both married and unmarried women who wish to "become parents without engaging in sexual intercourse," either as a matter of "personal choice or because their husbands or partners are infertile, impotent, or ill," while "protecting the men from later unwanted claims for support from the mothers or the children." *Id.* The court observed that the statute also protects female recipients from potential claims of parental rights by sperm donors, absent a written agreement. *Id.* While not imposing a time limit on the entry of a written agreement, "the statute implicitly encourages early resolution of the elemental question of whether a donor will have parental rights . . . while there is still balanced bargaining power on both sides of the parenting equation." *Id.* at 33-34. The court held that "the statute's gender classification substantially furthers and is thus substantially related to these legitimate legislative purposes and important governmental objectives." *Id.* at 34.

ADF erroneously argues that the state's interest in protecting against the creation of parental status for donors absent agreement of both parties is impermissibly based on "overbroad generalizations" regarding gender – namely, an assumption that, when not married to each other, neither a donor nor a recipient desires for the donor to have parental rights. ADF Br. 21 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (internal quotation marks omitted).) ADF cites to *Caban v. Mohammed*, 441 U.S. 380 (1979), in which this Court held that "a natural parental interest shared by both genders alike" could not serve as a rational basis for a law that permitted an unmarried mother, but not an unmarried father, to block adoption of their child by withholding her consent. *Id.* at 391-92; ADF Br. 21-22.

The Donor Statute, however, is not based on stereotypes about whether *men* wish to be parents or *women* wish to be parents. Rather, the Donor Statute is based on whether the acts involved in sperm donation and receipt of donated sperm in a medical procedure necessarily indicate consent to parental status. A recipient of donated sperm, by consenting to the medical insemination procedure, is demonstrating consent to the possibility of pregnancy and giving birth to a child, which will result in the recipient having the legal status of a parent. A sperm donor other than a husband, however, does not, by that mere act of sperm *donation* indicate any consent to

being a legal parent, and in most instances likely has no such intent.

In addition, a sperm donor by the act of donation indicates consent to the recipient's becoming a legal parent by virtue of the expectation that the recipient may bear a child. A recipient of donated sperm, however, does not, by undergoing a medical insemination procedure, indicate any consent to the bestowal of parental rights on a donor to whom she is not married. The Donor Statute reflects those different circumstances, not gender stereotypes.

There is no cause for this Court to grant the Petition to consider the Petition's contention that the Donor Statute discriminates between certain classes of men. The Petition states that D.H.'s "equal protection claim is that he be treated like other unwed fathers," Pet. 28, presumably meaning unmarried men who become fathers as a result of sexual intercourse. There are important differences, however, between sexual intercourse and medical insemination procedures, including the often unplanned nature of pregnancies from intercourse and the *necessarily* preplanned, methodical aspect of pregnancies resulting from insemination procedures.

B. The Donor Statute Does Not Discriminate Based On Fundamental Rights And Would Survive Strict Scrutiny In Any Event.

The Petition argues that, as applied, the Donor Statute violates the Equal Protection Clause by impermissibly discriminating with respect to his "fundamental parental rights." Pet. iii. To the extent D.H.'s Equal Protection claim is based on a claimed fundamental right of a provider of sperm to be deemed a legal parent, that claim fails for the reasons explained above in Section II. There is no such fundamental right.

Even if there were such a right, the Donor Statute would survive strict scrutiny. The Kansas Supreme Court had no need to consider whether the state's interests served by the Donor Statute are compelling because it rejected D.H.'s argument that a fundamental right was implicated by application of the Donor Statute here. Nevertheless, the government objectives that the Kansas Supreme Court identified as important – enabling men and women to expand their reproductive options, including without sexual intercourse; encouraging men to donate sperm by protecting them from claims for support; clearly and predictably protecting women from claims by donors for parental rights not agreed to, *see* App. 33-34 – are indeed compelling.

ADF argues that the Donor Statute is not narrowly tailored and cannot survive strict scrutiny

because "it does not encapsulate the expectations of every participant in an artificial insemination arrangement." ADF Br. 20. That is not a showing Kansas need make – and not simply because this case presents only an as-applied challenge. While the Donor Statute's requirements may turn out to be disappointing to persons who are unaware of that statute's requirements, the statute is narrowly tailored to the interests it serves and provides every donor and every recipient a clear opportunity – at the most opportune moment in the donation decision-making process – to document their expectations in writing.

Under the Donor Statute, any donor who wishes to parent a child resulting from his donation of sperm through a medical insemination procedure may insist on parental rights as a condition of donating sperm and enter a written agreement; any donor who does not intend to assume parental rights and responsibilities may decline to enter into such a written agreement. Both a donor and a recipient unsatisfied with the other's choice on the matter are free to walk away from the arrangement before the sperm is donated. Moreover, as the Kansas Supreme Court decision makes clear, there may be cases in which lack of a written agreement would be excused for equitable reasons (although this is not such a case, given D.H.'s waiver of equitable arguments under Kansas law).

ADF also suggests that the Donor Statute is not narrowly tailored because it would be possible to

draft a *more restrictive* statute requiring all participants in medical insemination procedures to state in writing their intentions regarding parental rights. ADF Br. 19. States may choose such a route, but the Constitution does not require it.

Although domestic relations laws, including laws governing parental rights, are subject to federal constitutional constraints, the mere existence of applicable equal protection or due process protections does not mean that the various states must invariably arrive at the same "solution" to family relations questions. Because "[i]t is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this," *Troxel v. Granville*, 530 U.S. 57, 90-91 (2000) (Stevens, J., dissenting), the federal courts should accept that states may choose different, yet equally constitutional rules regarding who will be deemed a parent.

V. Questions Regarding The Constitutional Rights Of K.M.H. And K.C.H. Are Not Properly Presented Here, And Their Rights Were Not Violated By Application Of The Donor Statute.

Although D.H. and *amici* urge this Court to decide questions regarding the constitutional rights of K.M.H. and K.C.H., D.H. has waived any right he may have had to press arguments about the

childrens' constitutional rights. This case also raises serious prudential standing concerns and would be a poor vehicle for this Court's consideration of novel questions about the constitutional rights of children conceived through medical insemination procedures.

D.H. and *amici* argue that the Kansas Donor Statute violates the children's equal protection rights. *See* Pet. 28-32; ADF Br. 23-26; Br. of *Amici Curiae* Keys for Networking, Inc. and Milfred Dale, Ph.D. ("Keys Br.") 14-19. Keys *Amici* also contend that the Kansas statute violates the children's due process rights. Keys Br. 5-14. Those arguments, however, were not timely raised below or addressed by the Kansas courts, and should not be considered by this Court. *See, e.g., Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004) ("We ordinarily do not decide in the first instance issues not decided below") (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001).)

Neither D.H.'s trial court brief nor his opening brief before the Kansas Supreme Court asserted specific constitutional rights on behalf of K.M.H. and K.C.H. Rather, those briefs' only references to the rights of children in general were contained in a description of an Ohio case as holding a statute "unconstitutional because public policy supports the concept of legitimacy and the concomitant rights of a child to support and inheritance." D.H.'s Mem. Br. 7. The Kansas Supreme Court briefly discussed children's interests, but as a matter of public policy in response to an *amicus curiae*. App. 38-40. D.H.'s

motion for rehearing in the Kansas Supreme Court argued that the Donor Statute violates the children's constitutional rights, but the Kansas Supreme Court denied rehearing. App. 1.

This case also presents troublesome prudential standing concerns.[2] D.H. has no parental rights with respect to K.M.H. and K.C.H. Although D.H. was permitted to bring this paternity suit under a Kansas statute that permits "any person" to file a paternity action "on behalf of . . . a child" as next friend, Kan. Stat. Ann. § 38-1115(a)(1), the children also have a guardian ad litem who was appointed by the trial court in S.H.'s CINC petition action, which was then consolidated with D.H.'s paternity action. Given this Court's preference "to leave delicate issues of domestic relations to the state courts," *Elk Grove Unified School Dist.*, 542 U.S. at 13, there is a distinct possibility that this Court would rule as a prudential matter that Petitioner lacks standing to raise constitutional claims on the basis of alleged violations of the children's rights.

In *Elk Grove Unified School District v. Newdow,* this Court held that a father who lacked legal custody of his daughter and was prevented under California law from suing as her "next friend," lacked prudential

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[2] The Petition's third Question Presented suggests that the Kansas courts "denied D.H. standing on the merits of the CINC and paternity petitions." Pet. iii. The Kansas Supreme Court affirmed the dismissal of the paternity action, but not on "standing" grounds. The CINC petition was dismissed as moot. *See id.* at 75.

standing to challenge a school district policy in federal court. 542 U.S. at 17-18. This case differs from *Elk Grove Unified School District* in that this case comes from a state court and a Kansas statute authorizes D.H. to file a paternity action as "next friend." *See* Kan. Stat. Rev. § 38-1115. Nevertheless, prudential standing concerns exist here regarding D.H.'s attempt to raise constitutional claims on behalf of K.M.H. and K.C.H.

This Court generally does not permit litigants to assert claims on behalf of third parties, *see, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976), but has provided exceptions when, among other requirements, "there [exists] some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991). The hindrance faced by the third party must be a "genuine obstacle" to the effective assertion of his or her own rights. *Singleton*, 428 U.S. at 116-17.

In this case, because the children have a court-appointed guardian ad litem to represent their legal interests, they do not face any hindrance in asserting their constitutional rights. The guardian ad litem has seen no need to oppose application of the Donor Statute or to raise any constitutional claims on behalf of the children. This Court therefore should deny the Petition in light of the possibility that the interests of D.H., who seeks this Court's review, diverge from the interests of the children. *Cf. Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978) ("There are good and sufficient reasons for this

prudential limitation on [third-party standing] . . . [including] the avoidance of the adjudication of rights which those not before the Court may not wish to assert").

Even if the children's constitutional claims were properly presented, this Court should deny review because there is no apparent conflict in state or federal court decisions regarding the equal protection and due process rights of children conceived through artificial insemination. Nor does the Kansas Supreme Court's decision conflict with this Court's decisions.

In arguing that application of the Donor Statute violates the rights of the children, D.H. and *amici* cite to this Court's cases concerning illegitimacy statutes. In those cases, this Court applied intermediate scrutiny and invalidated statutes the clear purpose of which was to discriminate against illegitimate children for the sake of punishing their parents. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The Donor Statute has no such discriminatory purpose. Rather, the Donor Statute encourages sperm donation and conception that results in the very existence of children, while serving the state's important, indeed compelling, interests in protecting the expectations of donors and recipients. Because the Donor Statute withstands intermediate scrutiny, there is no conflict with this Court's case law.

Nor does application of the Donor Statute impinge on the children's due process rights – procedural or substantive. This Court has never held that

children have a protected liberty interest in maintaining a filial relationship with their parents. *See Michael H.*, 491 U.S. at 130 (plurality). If children were held to have a liberty interest in maintaining a filial relationship with sperm donors, many men who otherwise might have been willing to donate might choose not to do so, in order to protect themselves from potentially unwanted claims for parental support. This Court should not consider any such issues here.

CONCLUSION

Respondent respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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